(13) (14)

Nos. 89-1027 and 89-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
Petitioners,

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
Respondents.

CSX TRANSPORTATION, INC.,
Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Date: September 19, 1990

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The American Train Dispatchers' Association and the Brotherhood of Railway Carmen [hereinafter, "union respondents"] on May 24, 1990 filed a motion to dismiss the Writs of Certiorari entered in these proceedings on the grounds that the issue as presented in those Writs had been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] or, alternatively, that they should be dismissed

as no longer presenting an important question of federal law which should be decided by this Court.

The Federal respondents replied to the motion but took no position on the issues of mootness or continuing importance; however, they suggested to the Court that it might "hold the motion until the Commission's decision issues,[1] at which time the parties could address the appropriateness of the relief sought by the union respondents".

On May 25, 1990, the railroad and Federal respondents filed their briefs on the merits. Union respondents' brief was due to be filed on July 20, 1990 but on June 11, 1990, the Court issued the following order:

> Further consideration of the motion of respondents American Train Dispatchers' Association, *et al.* to dismiss is deferred for 120 days. Further briefing in this case is suspended for 120 days.

On June 21, 1990, the Commission issued its written opinion[2] which union respondents consider to be in excess of the limitations placed upon the ICC by the remand order of the Court of Appeals. The union respondents requested the Court of Appeals to require the Commission to conform its decision and order to that court's remand order, which request was denied on September 10, 1990, effectively ending the proceeding in the court below.

A copy of the written decision of the Commission was filed with this Court by the Commission and is reported at 6 I.C.C.2d 715.

The Commission reversed and vacated the arbitration awards, a result the union respondents had sought since

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[1] The union respondents' motion was based upon a news release prepared by the ICC describing the contents of its then yet to be released written opinion.

[2] The decision is accompanied by the 19-page dissent of Commissioner Lamboley.

they first instituted these actions, and remanded the proceedings "to the parties to continue the implementing process in accordance with Section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision". (6 I.C.C. 2d at 757.)

ARGUMENT

The Commission's written decision confirms in every respect the contents of the news release attached to union respondents' motion to dismiss. It holds, for example, that in its decision in the instant proceedings it does not rely "on § 11341(a) for authority to modify CBAs [*i.e.*, collective bargaining agreements], but on § 11347 and our conditions imposed thereunder, an area the *Carmen* court did not reach" (*id* at 750-51); that whatever may be the extent or effect of the authority granted the Commission under Section 11341(a) of the Interstate Commerce Act [49 U.S.C. § 11341(a)], ICC authority "is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347" (*id.* at 720); and, that "whatever the extent of exemptive authority conferred by that provision [§ 11341(a)] with respect to mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions." (*Id.* at 751 n.29.)

The Commission goes on to note that indeed, it is employing a new approach, a "return to the pre-1980 approach based upon harmonizing the provisions of these [Interstate Commerce and Railway Labor] Acts" (*id.* at 718) by which it "wish[es] to reestablish the balance between the employee's legitimate right to bargain over the conditions of his employment and the railroads' equally legitimate right to promptly carry out transactions . . . ." (*Id.* at 721.) It acknowledges that for almost forty years a "relatively harmonious working relationship" existed "between management and labor when im-

plementing ICC-approved conditions", but that since 1979, labor, management and the Commission "have been immersed in litigation involving the role of the RLA, the ICA, and the Commission's conditions".[3] (*Id.* at 745.) The Commission then concedes that a major factor contributing to the loss of industry harmony was "our decision in *DRGW* in 1983, followed by *Maine Central* in 1985" which arbitrators interpreted as holding that "§ 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation" and that "the inconsistencies between Section 2 and 4 of the *New York Dock* conditions are to be resolved in favor of Section 4 . . . ." The Commission then confirms the fact that "[u]nder these interpretations, the preservation of contracts under Section 2 is given essentially no effect and any terms of a CBA can be overridden if it [sic] 'impede[s] effectuation' of the merger". (*Id.* at 746.) The Commission then determines that it does "not today endorse the broader implications of the arbitrator's ruling in the *Dispatchers* award nor . . . [does it] assert that any authority conferred by § 11341 may be exercised without regard § 11347 and the labor protective conditions." (*Id.* at 752.)

Union respondents respectfully submit that the Commission has shifted the focus of the dispute in these cases from the scope of the Commission's authority under Section 11341(a) to the scope of its authority under Section 11347, an issue not reached below and not presented by petitioners to this Court. Indeed, viewed against the backdrop of the Commission's decision, the meaning of Section 11341(a) becomes virtually irrelevant for, as the Commission has now concluded, regardless of the "extent or effect of . . . Section 11341(a) . . . , [ICC authority]

[3] The Commission errs regarding the year in which this litigation began. It began in 1983 following the Commission's decision in Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western R. Co. - Trackage Rights - Missouri Pacific R. Co.* (not printed), served October 25, 1983 (*DRGW*).

is also defined and limited by . . . § 11347". (*Id.* at 720, *supra*, p. 3.)

CONCLUSION

While the Commission's published decision may have raised a number of issues regarding the validity of the Commission's current view of its authority, union respondents respectfully submit it confirms that the issue now before this Court on writs of certiorari has been rendered moot or, at the least, has lost any stature as an important question of federal law that this Court should decide and, that the writs now should be dismissed.

Respectfully submitted,

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